

FILE COPY

Office - Supreme Court, U. S.

DEC 12 1947

CHARLES ELMORE CROPLEY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1947

No. 442

RANDOLPH PHILLIPS, *Petitioner*,

v.

THE BALTIMORE AND OHIO RAILROAD
COMPANY, *Respondent*.

**BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

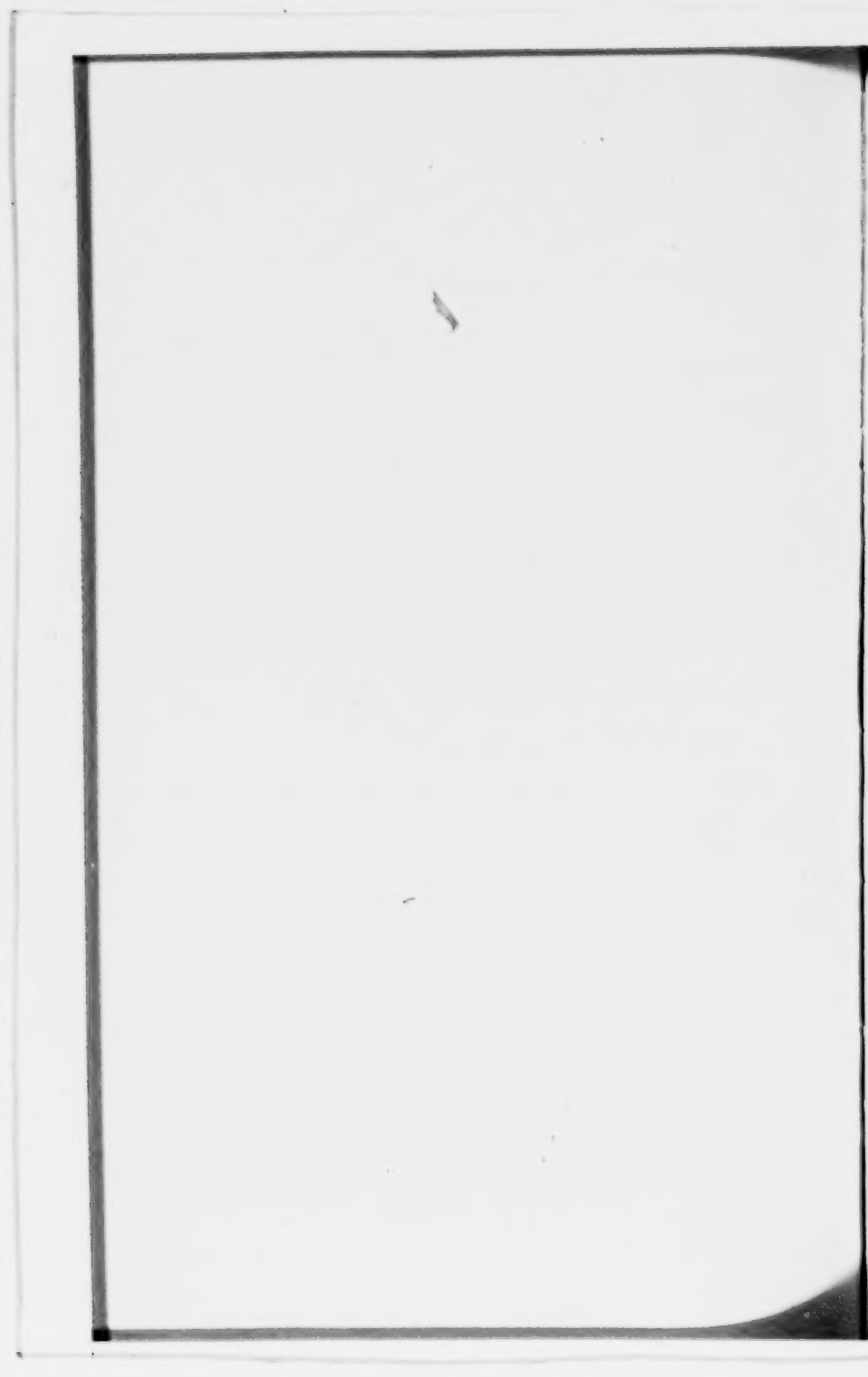
✓ EDWIN H. BURGESS
✓ FREDERICK E. BAUKHAGES
Counsel for Respondent

SULLIVAN & CROMWELL
VENABLE, BAETJER & HOWARD
Of Counsel



CONTENTS

	Page
OPINION OF THE COURT BELOW	1
JURISDICTION	2
THE MOTION FOR LEAVE TO DISPENSE WITH PRINTING	2
STATEMENT OF THE CASE	4
THE SENATE COMMITTEE PROCEEDINGS	7
THE "NEW EVIDENCE"	10
The RFC Letter of April 6, 1944	12
Alleged "Suppression" of Evidence	14
The Forecast of Available Cash for 1945	14
Alleged "Alteration" of the "Working Capital Minute"	16
The "Clear and Unequivocal Testimony" of the "Invited Expert"	18
CONCLUSION	22
APPENDIX	24



IN THE
Supreme Court of the United States

OCTOBER TERM, 1947

No. 442

RANDOLPH PHILLIPS, *Petitioner*

v.

THE BALTIMORE AND OHIO RAILROAD
COMPANY, *Respondent*.

**BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

OPINION OF THE COURT BELOW

The order to which the petition is addressed was entered by the District Court of the United States for the District of Maryland, Circuit Judges Soper and Dobie and District Judge Chesnut sitting, denying Petitioner's motion to vacate the final decree (hereinafter referred to as the Decree) entered March 13, 1946 by those judges, sitting as a Special Court duly convened pursuant to the provisions of Chapter XV (sec. 713) of the Bankruptcy Act, in a proceeding entitled, "In the Matter of The Baltimore and Ohio Railroad Company Petitioner in Proceedings for a Railroad Adjustment under Chapter XV of the Bankruptcy Act No. 9905 Bkpt. Dkt."

The Decree itself had been made the subject of a petition for a writ of certiorari, filed by the Petitioner herein and docketed as No. 1220 at this Court's October, 1945 Term. That first petition was denied by this Court's order

entered June 10, 1946. 328 U.S. 871. Rehearing was denied by order entered October 14, 1946. 329 U.S. 821.

To distinguish them, we hereinafter refer to the petition in No. 1220 as the First Petition and to that now before the Court as the Second Petition.

JURISDICTION

The Second Petition states—

“The jurisdiction of this Court is invoked under Section 745 of Chapter XV of the Bankruptcy Act (11 U.S.C. 1245).”

Chapter XV of the Bankruptcy Act expired by limitation on November 1, 1945.

It is respectfully submitted that this Court is without jurisdiction to review on certiorari the order of the District Court denying Petitioner's motion to vacate the Decree¹.

THE MOTION FOR LEAVE TO DISPENSE WITH PRINTING

With the Second Petition, Petitioner filed a motion for

¹ The motion to vacate was considered by the court below as—

- (1) a motion for a new trial on the ground of newly discovered evidence; and
- (2) a motion for relief from a judgment taken against Petitioner through his mistake, etc.;

and, as such, found not entertainable because withheld from filing for some 18 months after entry of the Decree, and because the alleged new evidence “is not controlling but merely cumulative to that previously given at the hearing”.

In spite of its expressed doubt as to its jurisdiction to do so as a Special Court under Chapter XV, the District Court also considered and found that “the allegations of the motion do not constitute a sufficient basis on which a bill of review or an independent action can be sustained” to relieve Petitioner from a judgment (the Decree) obtained through alleged fraud.

leave to dispense with the printing of the record. The motion indicates (as does the praecipe for record which Petitioner filed with the Clerk of the District Court) that Petitioner is laboring under the misapprehension that he was entitled to a trial *de novo* in the Special Court and, likewise, in this Court. Assuming this Court's jurisdiction to review the District Court's order denying the motion to vacate, the record on which that order was entered consists, not of the "5,000 pages of testimony and exhibits" on which the Special Court entered the Decree, but rather of the motion itself together with the document alleged in the motion to contain the "newly discovered evidence". That document is a 755 page transcript shown on its face to have been "printed for the use of the Committee on Banking and Currency" of the United States Senate³. Other "testimony and exhibits," affidavits, etc., which Petitioner now seeks to have brought before this Court have no bearing on the issue which he seeks to raise in his Second Petition.

Accordingly, Respondent has suggested to the Court that the motion to dispense with printing should be denied.

² As the Second Petition, itself, states (p. 5)—

"The record on the motion includes 755 pages of documents and oral testimony representing in large part new evidence discovered by the Committee on Banking and Currency of the United States * * *."

³ The District Court, on Petitioner's motion, ordered its Clerk to send to this Court the copy of this 755-page transcript originally filed with the Motion to Vacate the Decree. Its pages were not re-numbered to conform with the remainder of the record herein. Accordingly, references in this brief to that document are to its original page numbers, prefixed by the letter "S".

STATEMENT OF THE CASE

Even could it be established that this Court has jurisdiction to review on certiorari the order of the District Court, the Second Petition presents no valid reason for invoking that jurisdiction.

The avowed justification for the Second Petition is that the Special Court "applied erroneous standards of law in determining the issues of fraud and good faith" in reaching the findings upon which the Decree was entered. That same question was presented to this Court at its October, 1945 Term by the same petitioner in the statement—

"In deciding that the petition⁴ * * * was filed in good faith, the [Special] court decided the question * * * by the use of an erroneous standard" (First Petition, p. 22).

In the terms of the Second Petition there is no claim of anything new and different, in relation to the case sought to be made out by the First Petition, but the "evidence discovered by the Senate Committee" and contained in the printed transcript appended to Petitioner's motion to vacate the Decree. Just what that "new evidence" is, is hereinafter developed⁵.

⁴ Filed July 2, 1945, initiating the proceeding which terminated with this Court's orders of June 10 and October 14, 1946 in No. 1220, October, 1945 Term. In the petition for rehearing denied by the order of October 14, 1946, Petitioner again stated that "the court made clearly erroneous findings of law" on the issue of "respondent's good faith."

⁵ The Second Petition states "There is no issue of fact in this proceeding", and "All the facts alleged in the 41 numbered paragraphs of the motion to vacate the decree are admitted." These statements are nothing short of amazing. The very document by which Petitioner sought to bulwark his motion to vacate the Decree is a testimonial to the falsity of his charges. See *infra*, pp. 10-22.

In substance and effect the "new evidence" is but a repetition of the same criticism of and attack upon the Respondent's financial management and its Adjustment Plan which Petitioner had presented to the Special Court and which that Court fully considered before entering the Decree approving and confirming the Plan, and again considered in denying the motion to vacate the Decree.

Petitioner would have this Court believe that all of the "new evidence" was adversely critical. He omits mention of the statements endorsing the soundness and good faith of Respondent's financial management and Plan received by the Committee from the only disinterested witnesses who appeared before it⁶.

In any event, viewing the matter in the light most favorable to Petitioner, the Second Petition presents the question whether (the jurisdictional question being disregarded) the transcript of proceedings before a committee of the United States Senate in which persons who had been witnesses in a court proceeding, concluded some 12 months previously, were subjected to cross examination on the subject of their court testimony can be regarded as "new evidence" for the purpose of collateral attack on the final decree entered in the court proceeding.

If that question be answered in the affirmative, two other questions are presented:

1. Was the "evidence" set out in the committee transcript "newly discovered"; and, if so,
2. Was the "newly discovered evidence" of proba-

⁶ Two of the witnesses unrelated to Respondent or to RFC, who had given testimony in the Special Court, appeared before the Committee. One said—"I thought then, and I still think, that the plan was sound and as good a plan as could be worked out" (S 610); the other, that "my general impression is that the B&O has handled its finances well and ably" (S 587).

tive value and pertinent to the issues determined in the court proceeding?

Testimony before a legislative committee, in a proceeding in which none of the rules of evidence or of judicial procedure are observed, cannot possibly be regarded as evidence acceptable to a court⁷. But even if the nature of the proceeding on which Petitioner now rests his case be disregarded, the "evidence" is of personal opinions. And exalted position in public or private life cannot clothe its holder's opinion with weight when it is given expression, as in this case, without knowledge of the subject matter⁸.

But for the fact that the Second Petition⁹ seeks to impugn the integrity of officers in the executive department of the federal government, and of private citizens publicly and widely known because of their positions in the management of one of the nation's great railway systems, this

⁷ The Appendix to this brief quotes excerpts from the transcript of the Committee's proceedings illustrative of the substantive difference.

⁸ We speak advisedly. See *infra*, pp. 18-22.

⁹ The Second Petition and the motion to vacate the Decree are no more than a re-publication of the charges, originated by Petitioner and, though long since thoroughly refuted, reiterated by or for him at every opportunity. In addition to his personal appearances and "affidavits" and petitions in the Special Court and in this Court, he has assiduously sought out and made the fullest possible use of other forums. In August, 1945 he "furnished" (S642) a statement of his charges (S 205-208) to the chairman of the Senate Interstate Commerce Committee, who was subsequently unable "to ascertain" how his letter reciting them "got originally into the hands of the New York Times" (S 642). However accomplished, that letter's publication was well-timed to provide a curtain riser of publicity for the Special Court's September, 1945 hearings. Although Petitioner was "not called to testify" at the Banking Committee hearings, as he had "hoped to be" (S 695, the so-called "prima-facie case" (*infra*, p. 8) was so faithful a recital of his "case" as materially to aid his purpose (S 440).

brief would end here. That it cannot will be apparent from what follows.

THE SENATE COMMITTEE PROCEEDINGS

Reconstruction Finance Corporation (hereinafter called RFC) is an agency, in corporate form, of the federal government.

Under the statute creating it, RFC's life was due to expire by limitation on June 30, 1947, unless extended by Congress. The Committee on Banking and Currency of the United States Senate determined to hold hearings for the purpose of developing factual information on which it could base a recommendation to the Senate that RFC be continued or discontinued as an agency of the federal government. (S 1)

Beginning in early January, and continuing through February, 1947 (S 99-110), the committee chairman, by correspondence with RFC, developed a record of the names of "men working for the RFC" who had "obtained positions with railroads", together with information as to—

"* * * the positions they held when they left the RFC, the posts, positions, or connections they obtained in connection with such railroads, the salaries they were receiving at the RFC, and the salaries they * * * obtained in connection with such railroads * * *" (S 100).

Under date of March 28, 1947, the committee chairman wrote the chairman of RFC's board of directors, stating "that three former Reconstruction Finance Corporation officials now hold good positions in the control of the B&O Railroad" and suggesting that RFC's obligation to purchase certain of Respondent's Collateral Trust

Bonds required to be issued and sold to and purchased by RFC by the terms of the Decree, should not be respected because it was, in the opinion of the committee chairman, "clearly illegal". The letter conveyed the "request that the Reconstruction Finance Corporation should not carry out the transaction * * * until after you and your directors have conferred with the * * * Committee". (S 110-111)

The RFC chairman responded, under date of March 31, 1947, pointing out that (S 112)—

"The new collateral trust bonds will be issued by the B&O pursuant to its plan of adjustment which has been approved by a special three-judge district court. Last June the Supreme Court refused to review this decision".

Thereafter, and on April 9, 1947, the committee chairman sought and obtained delivery, on April 10, 1947, of certain of Respondent's files and documentary records on the subject of its "Adjustment Plan dated September 20, 1944, as Modified". (S 7)

Upon receipt of Respondent's files and records, at approximately 10.30 A.M. on April 10, 1947, the committee began hearings. At the outset of the first hearing, on April 10, 1947, the committee's counsel read—

"* * * a memorandum of the prima facie case which I have developed from the records and evidence that has come before us * * *" (S 1).

The committee's counsel stated that the "net conclusion" to be derived from a review of the facts "developed from the records and evidence that has come before us" was that—

"* * * evidence essential to the determination of the issues was not presented * * * (2) to the Interstate Commerce Commission which had to make

essential preliminary findings of fact, and (3) to the district court which had to make other findings in addition to those made by the Interstate Commerce Commission" (S 7).¹⁰

Thereupon ensued the following colloquy:

"The CHAIRMAN. Let me ask you a question. You will be prepared at these hearings to furnish evidence to substantiate these statements?

"MR. L'HEUREUX. We have evidence in the way of records, court records, and RFC files to back up these statements, and other memoranda and data and testimony of witnesses, *and we have not yet had an opportunity to go through the B&O records which have been brought in this morning*, but that will be done thoroughly" (S 7; italics supplied).

In addition to the hearing held on April 10, 1947 the committee, or a subcommittee, held hearings on April 11, 29 and 30 and on May 5, 6, 22 and 23, 1947. In the course of those hearings, officers of Respondent and of RFC were examined extensively and permitted to make statements. Also examined and permitted to make statements were certain individuals who had appeared as witnesses for Respondent in the proceeding in the Special Court for approval and confirmation of Respondent's Adjustment Plan, the proceeding which had terminated in this Court's orders of June 10 and October 14, 1946 in Cause No. 1220 at this Court's October, 1945 Term.

¹⁰ It should be recorded that this rather narrow position taken by the committee's counsel was broadened, subsequently, by the committee chairman, who stated—

"* * * this committee must reach a decision * * * *without reference to any language of the district court in the B&O case. However, if the district court had made a finding approving RFC's participation, this committee would still have the responsibility of making its own decision on its own grounds*" (S 550; italics supplied).

THE "NEW EVIDENCE"¹¹

On May 21, 1947, after six days of hearings (on April 10, 11, 29 and 30 and May 5 and 6), and after the committee's counsel had "had an opportunity to go through the B&O records",¹² the committee met in closed session to consider and determine the course of its further proceedings. The committee chairman there read a memorandum in the nature of a progress report (S 549-556). Thereupon—

"* * * one of the Senators asked that the attorney for the committee might take this 15- or 16-page statement and sum it up into the points in question, which he did, and presented to the committee yesterday" (S 456).

When the committee met for its further open hearing on May 22, 1947, a member recalled the summation made by the committee's counsel and that the committee in closed session had unanimously voted to confine its further proceedings to the "12 accusations against the B&O and the RFC" set out in that summation, and stated—

"I would like to see us proceed as best we can under the instructions of the committee as a whole.

"The CHAIRMAN. That is what we will do. Mr. L'Heureux drew up this statement that you mentioned. What do you say about this statement of 15 pages?

¹¹ Reference is here made to the meticulously detailed analysis of the alleged "new evidence" in the memorandum of Respondent's Counsel recorded at S. 727-746.

¹² S7. The record of the committee's proceedings up to that time is set out in the first 452 pages of the "755 pages" comprising the "record on the motion" to vacate the Decree. Nothing "new" appears in the remaining 303 pages.

"MR. L'HEUREUX. I was somewhat puzzled, Senator Capehart, when you mentioned yesterday and today about 12 accusations, or whatever they are, 8 accusations, because what you hold in your hand is nothing but an answer to Senator Robertson who asked the committee counsel to please give a memorandum of the differences between the testimony presented to this committee, and the testimony presented to the court. There seemed to be a frank inquiry on his part as to whether there was any difference.

"So I stated those differences. *These are not 12 accusations or any thing. They are differences in the evidence that have [sic] been presented before this committee that the district court did not have the benefit of*" (S 457; italics supplied).

Since the announced purpose of the committee hearings was to bring to light "evidence essential to the determination of the issues [which] was not presented"¹³ to the Interstate Commerce Commission or to the Special Court, it is unfortunate that counsel's memorandum of the "12 accusations or whatever they are" was not filed for record. Fortunately, however, their substance, which identifies the alleged new evidence, is recorded, together with an analysis (S 649-665) citing their immateriality and indicating the extent to which they were brought to the attention of the Special Court and held insufficient.¹⁴

Additionally, because of the extent to which 3 of the

¹³ S10.

¹⁴ As the District Court stated, the alleged "newly discovered evidence" relates—

"* * * for the most part, to questions raised during the hearing of the case and considered in the opinion, * * * merely cumulative to that previously given at the hearing" (R 73).

"12 accusations" occupied the attention of the committee chairman, they are commented upon in the following text.

1. The RFC Letter of April 6, 1944.

There is scarcely a one of the 755 pages of the transcript of the committee hearings that does not contain some reference to the letter to Respondent, dated April 6, 1944, in which RFC stated the general conditions upon which it would grant a renewal, or extend the maturity, of Respondent's indebtedness to it, then scheduled to mature in the latter part of that year.

The Special Court had been exhorted by Petitioner to find that letter to have been "inspired" by Respondent—the product of "collusion"—"insincere and pretended".

When working drafts, not one but two, of that letter, composed by Respondent's Vice President, were found in RFC's files, the committee chairman was moved to exclaim—

"I do not have the words to describe it. It is part of the system of thimble-juggery that has been going on through this whole thing, and the 'Doubting Thomases' can read it. Talk about skullduggery in high finance" (S 68).

Assiduously engaged in a search for "thimble-juggery" and "skullduggery", the committee chairman paid scant attention to the statement of the RFC witness being heard at the time, whose response to the "surprise" question as to the existence of the "drafts" was, in the circumstances, a *res gestae* statement. That witness, in whose files the "drafts" reposed, said—

"May I say, Senator, that Mr. Wright¹⁵ was in

¹⁵ The late Frank C. Wright, in 1944 special assistant to the RFC board of directors on railroad matters (S 53).

New York a great deal of his time. Quite frequently he would discuss railroad affairs with various railroad people including probably Mr. Snodgrass, and Mr. Wright for the purpose of convenience and I imagine in this case, would say to Mr. Snodgrass, 'I think that Mr. Jones would be agreeable to whatever it is. However, if you will prepare a draft of a letter that might satisfactorily take care of the situation we will submit it'" (S 69).

Of course, the "crucial question" was not, "who put the words on the paper", but "who conceived the idea of conditioning RFC's forbearance to demand payment upon concessions by other creditors of maturity extensions necessary to protect RFC against the adverse consequences that unconditioned forbearance could have entailed". The letter of April 6, 1944, was RFC's own letter, signed by its Chairman, and expressed the conditions upon which its forbearance might be obtained. The fact that, as a matter of common business practice, a draft of the letter embodying those conditions had been submitted by Respondent's Financial Vice President to RFC for its use, if approved by it, is immaterial. The material facts are that the letter itself was in evidence before the Special Court and that the conditions it contained were found by that Court to be those imposed by RFC. One hardly needs the wisdom of a Solomon to comprehend the importance to RFC of relief from "this great overhanging cloud of 1948" (S 592)—the approaching maturity of over \$200,000,000 of publicly held prior lien mortgage bonds (S 234). And Mr. Jones' "concern that the plan" to accomplish that end "must be one satisfactory to the RFC", as observed by the chief protagonist of the "prima facie case" (S 19), is readily understandable.

2. Alleged "Suppression" of Evidence

A. *The Forecast of Available Cash for 1945.*

Prior to agreement by RFC to purchase the bonds which the Plan provided would be issued in order to refund Respondent's maturing indebtedness to RFC, application was made, in January, 1945, pursuant to the provisions of the Reconstruction Finance Corporation Act, for Interstate Commerce Commission approval. The Commission requested and was given a forecast of Respondent's receipts and disbursements, by months, for the year 1945. The forecast was prepared by Respondent's Treasurer (S 647). He explained the differences between his forecast and the actuality in simple and readily understandable terms—

"* * * in preparing my forecast, I ordinarily would use the previous year's figures, but the previous year's figures were based on a full war year [1944], and I was facing 11 months or how many months of war I did not know. Therefore, on the basis of that, I made my figures up and the result was that I underestimated up to August when Japan collapsed; but from September on, I overestimated my receipts and disbursements.

"Now, the result was that at the end I had \$85,481,000 cash and Government bonds on hand instead of \$34,911,000 which I had estimated, approximately a difference of \$50,000,000 I should say. Well, you should take that into consideration in making that comparison, that the estimate provided for the payment of all items estimated during that period, but actually there was outstanding at the end of that period 8,522,000 [sic] outstanding acceptances. I might explain what outstanding acceptances mean.

We do not take any items up into our cash until they are actually paid by the bank.

"In other words, we send out \$6,000,000 worth of pay checks today, but we do not take them up into cash until the bank pays them and sends them to us. So those outstanding acceptances are a liability that has to be paid from the cash on hand on December 31.

"In addition to that, I overestimated my income taxes by \$7,219,000. Well, that difference was due to the fact that the President issued a proclamation in September discontinuing the amortization of equipment. It resulted in a credit, and we had to pay some additional taxes. That accounts for \$15,000,000. My receipts were overestimated by slightly less than 6 percent, \$26,000,000; as I say, the only way to account for that is the fact that I wanted to be conservative in the uncertain outlook at that time.

"The other big item that I overestimated was my drafts. Well, the drafts were a very difficult item to estimate at that time because traffic was being shoved all around the country, especially after the war with Germany was over. Then, of course, everything moved west. About 60 percent of those drafts represent traffic balances, that is settlement between roads; and we never know what that is going to amount to until we get each month a statement from the roads of what traffic they have handled. Of course, we know what we have handled, and we put the two together and we settle on balances. If the other road owes, we draw on them, and vice versa.

"Now, I was requested, also, to make a forecast in 1946 for 4 months, and that shows instead of an

overestimate of receipts, an underestimate of receipts of about 8 percent. Now, that is accounted for to a very large extent by the strikes. The one I have particularly in mind was the coal strike which lasted 59 days, and I estimated that we would have on hand \$29,000,000 in cash and Governments. We actually had on hand \$34,000,000 in cash and Governments, but we had against that those outstanding acceptances of \$12,000,000, which made \$22,800,000 against my estimate of \$29,000,000" (S 647-648).

As in every other particular, we rest here, in full confidence, on the record.

B. Alleged "Alteration" of the "Working Capital Minute"

The brief in support of the Second Petition seeks to make capital, as "evidence withheld from the court" of an isolated statement in a preamble to a resolution presented to and adopted by Respondent's President and Directors at a meeting in April, 1943 that—

"* * * the amount of working capital which would be adequate and requisite for the purposes of the Company should not be less than \$6,225,000" (S 402). The statement is alleged to have significance in connection with testimony before the Special Court and the committee as to funds available to Respondent, in the fall of 1944, for application in reduction of its indebtedness to RFC. When considered in its context, the record shows that the quoted statement employed the term "working capital", not in the strict sense of that term, but rather as a misnomer for "cash balance on hand and un earmarked" (S 650), a very different thing.

In any event, the very record of the alleged "new evidence" itself shows that in the opinion of one witness, whose long experience in railroad financial affairs needs

no testimonial, a railroad's need for working capital is not "susceptible of arithmetical calculation" (S 586). That witness went on to indicate the "variables that entered into the 1945 results" and expressed the thought that—

"When you have weighed all the variables * * * I think you will conclude that I was approximately correct in believing in September 1945 that the company could not have invaded its working capital to any appreciable extent in 1944 to pay off the RFC. Furthermore, today's position and the quotation of its securities abundantly confirm that my testimony was not too conservative * * * I do know, or it is my opinion based on experience, that the B&O could not in 1944 have safely paid any appreciable amount down on the RFC loan.

"I do not pretend to have any finite knowledge about these matters. I may be wrong up or down, and you might easily prove to me that I am. But my general impression is that the B&O has handled its finances well and ably" (S 587).

As to the suggestion that Respondent's corporate minutes were deliberately altered, the committee record now relied upon by Petitioner shows the following—

"The CHAIRMAN. Do you remember the circumstances of the suppression of this minute or part of this minute; why it was suppressed?

"MR. MAY.¹⁸ No; I do not.

"The CHAIRMAN. Do you remember who changed the minutes of the director's meetings, or doctored or any word you want to us [sic], of April 21, 1943?

"MR. MAY. I know of nobody changing the min-

¹⁸ George F. May, Secretary of Respondent from February 1, 1929 to December 31, 1944.

utes except possibly at the subsequent board meeting, when a suggestion was made that possibly the minutes just as stated might have a change in verbiage.

"The CHAIRMAN. Was alteration of the minutes of this character months after they were made a common thing, in your experience?

"MR. MAY. Absolutely no.

"The CHAIRMAN. Do you recall any other instances on [sic] which the minutes were changed or eliminated or doctored during Mr. Daniel Williard's regime?

"MR. MAY. I do not.

"The CHAIRMAN. Did you protest at this time the changing or elimination or doctoring of any minutes taking place, and if so, to whom?

"MR. MAY. *I do not recall the necessity for protesting.*

"The CHAIRMAN. *But if there had been a necessity, you would have protested, would you?*

"MR. MAY. *Yes, if anybody wanted me to change the minutes in the book, I certainly would have protested; I would not have done it*" (S 417; italics supplied).

3. The "Clear and Unequivocal Testimony" of the "Invited Expert."

Midway the hearings before the committee its chairman stated "to the committee, and to the press," that he had invited the chairman of the board of one of Respondent's competitor railroad companies—

"* * * to testify as an expert on the question of whether the B&O Railroad was honestly able or unable to meet its debts to the RFC, as it alleged it was in the district court in 1945" (S 272).

That "testimony" is recorded at pp. 272-286 of the transcript of the committee proceedings. The committee chairman had sent the witness "certain figures * * * to use in basing [his] opinion" (S 275).

The committee chairman asserted that this witness' "testimony was clear and unequivocal" (S 553). As to that, and its materiality as ground for the Second Petition, we quote from the record—

"Senator ROBERTSON of Virginia. I do not know anything about the secret facts. I just assumed that [the witness] gave us figures from public records, that they were available to the court hearings, and that it developed there and the court considered it, the court held that it was a proper plan. It went to the Supreme Court twice, and was refused. Then they had a petition for rehearing before the special court this spring and again the action was confirmed. I thought at some time in that proceeding everything of a factual character pertinent to the bona fides and the inherent justice of what was being done was developed.

"[The WITNESS]. You would not hold the court responsible, would you, to what the RFC and the B. & O. officials, and men like Mr. Stedman testified to under oath? And if they were to make misstatements under oath, you would not blame the courts for putting the plan through on the basis of their statements, would you?" (S 278).

* * * *

"Senator ROBERTSON of Virginia. The testimony before us on that was that if the RFC had taken the liquid assets that were available it would have received in cash only about one-half of its debt and that the other half would have been in a greatly

more unfavorable condition, the collection of which might never be made. That was the previous testimony.

"[The WITNESS]. All I can say to that is that the Nickel Plate successfully met a \$15,000,000 maturity in 1938 and 1939 with \$2,000,000 in cash. We had an honest ownership management, and we went out and took care of our security holders without squeezing them" (S 279).

* * * *

"Senator FULBRIGHT. * * * Well, just to sum it up, your opinion is that the B. & O. could have paid off at least \$30,000,000, and the B. & O. would have been quite able to continue operation in a satisfactory and solvent manner?

"[The WITNESS]. *I am absolutely certain of it.*

"Senator FULBRIGHT. You are certain of it?

"[The WITNESS]. On the basis of the figures. *Maybe there is something that I do not know about, but if so, apparently it has never been brought into the proceedings*" (S 285; italics supplied).

But the "expert witness" was most positive in his "direct testimony". That amounted to what the committee chairman later referred to (S 430) as an "indictment" of Respondent's officers.

That the "indictment" was drawn without knowledge of the subject matter was also established of record. It was taken "apart word by word and line by line" before the committee concluded the hearings (S 631).

Thus, the "indictment" charged—

"It has been argued that a railroad must maintain large cash balances and a substantial net working capital position to carry on operations. *This is not*

the case. * * * On balance, a railroad receives cash for its services before it is required to lay out cash for labor, supplies, and so forth, to render that service" (S 273; 634; italics supplied).

That statement was made on May 5, 1947. Two weeks before that date, as the committee record shows, the annual report, for the year ended December 31, 1946, of the railroad company of which the witness is, and was, board chairman, was presented to its annual stockholders' meeting, signed by the company's President "By Order of the Board of Directors". In that report, reference was made to that company's need for "Cash and Government Securities". The need was expressed in these words—

"To pay its employees, to pay taxes, to buy supplies, and to meet its bills, the [company] must have on hand *considerable sums* of cash and securities that it can readily convert into cash. *On December 31, 1946, it had \$23,063,670 in cash, compared with \$26,008,221 a year earlier*" (S 635; italics supplied).

In furtherance of his indictment, and in his "prepared statement", the witness said that even his "rich" company—

"* * * found it profitable *to reduce its net working capital position to a few million dollars from the end of 1943 to the end of 1945* at the very time it was doing the largest business in its history, and witnesses were saying the Baltimore & Ohio needed a record-breaking sum of working capital" (S 273; 636; italics supplied).

Official reports of the witness' "rich" company to the Interstate Commerce Commission show that from the end of 1943 to the end of 1945 the net working capital position of that company, that is, current assets less current liabilities, *increased over \$35,000,000* (S 636).

In all justice, it should be recorded here that the committee chairman had not had the foregoing facts brought to his attention when, summing up the "evidence" at the closed session on May 21, 1947, and referring to the testimony of the "expert witness" to the effect that—

"He was also of the opinion that B&O's contention that it needed large sums of working capital was unfounded [citing his own company's] practice of operating with very limited cash",

the committee chairman concluded—

"Although one may quarrel with certain other expressions of opinion by [the witness], it is difficult to avoid accepting his opinion on the financial question of B&O's ability to meet its debt to RFC at the time of its maturity and since that time" (S 553).

CONCLUSION

The Second Petition is a collateral attack on a final decree entered by a court of competent jurisdiction in an adversary proceeding. But only in form.

In essence it is an unfounded imposition upon the judicial process. It alleges that a fraud was practiced by Respondent on its creditors, and on the Special Court. Respondent's creditors number in the tens of thousands. Only one of them perceived the fraud.¹⁷ He perceived it early. He came into the proceeding in the Special Court proclaiming it.

When the judges of the Special Court could not be made to see the fraud, he charged them as parties to it.

¹⁷ "In view of our [sic] position before this Court in 1939, our [sic] personal financial advantage over the average security owner, and the accident of fortune that gave us [sic] a specialized insight in the field of railroad finance, we [sic] felt we [sic] had a public duty to do what we [sic] have done" (S 637).

When he was unable to persuade this Court that the fraud had been done, he turned to the legislative halls. The legislators were told that the matter was "an offense that smells to heaven". But they, too, were unable to perceive the fraud. In the words of one legislator—

"I do say as a member of the committee, having attended the hearings, the wind has not blown my way, because I have not gotten the scent as yet" (S 158).

Thus the genesis of the Second Petition.

And what is its object?

"Petitioner does not and would not ask recall of any of the new bonds or any change in their new maturity dates" (Brief, p. 76),

issued in consummation of the Plan which was approved and confirmed by the Decree of which the Second Petition, in effect, again seeks review

Yet, extension of the maturity of Respondent's funded debt issues—removal of the "great overhanging cloud of 1948"—is the essence of the Adjustment Plan which was, allegedly, the fraud.

It is submitted that the object of the Second Petition is implicit in its immoderate language.

The Second Petition should be denied.

It and its supporting papers should be stricken from the records, both of this Court and of the court below.

Respectfully submitted,

EDWIN H. BURGESS

FREDERICK E. BAUKHAGES

Counsel for Respondent

SULLIVAN & CROMWELL

VENABLE, BAETJER & HOWARD

Of Counsel

December 11, 1947

APPENDIX

"An examination of the testimony will show that the widest latitude was given to the investigation by the subcommittee. Witnesses were not restricted to matters within their own knowledge, but were allowed to testify as to their beliefs and suspicions, unsupported by any facts, and to narrate hearsay evidence of no higher a character than the fugitive rumors which are not infrequently current on the streets of a State capitol preceding the election of a United States senator.

"It may be at times impossible for a legislative committee to apply to an investigation the rules which govern the admissibility of evidence in courts of justice, but * * * in an investigation into the truth of allegations affecting the personal honor of a member of the Senate * * * no such wide departure should be allowed in the admission of testimony as the evidence in the case permitted * * * .

"The undersigned objected at the very commencement of the investigation to the latitude in the examination of witnesses which is usually allowed in investigations by legislative committees, and insisted on observance, as far as possible, of the rules which obtain in courts of justice in that regard. Had this suggestion been adopted in practice, the testimony in this case would have been compressed into a very narrow compass, and would have excluded a large mass of irrelevant testimony * * *".¹

The following excerpts are taken from the transcript appended as Appendix A to the Motion to Vacate the

¹ Senate Report No. 540, 45th Congress, 2d Session.

Decree, which Petitioner has sought to have included in the record herein—

1. "The CHAIRMAN. * * * I might also forewarn the audience here this morning, and such of the committee as are present, the testimony will have no reflection, in my judgment, in the spectacular, not of the headline variety, and it will be line on line and precept on precept. We are laying the foundation; for, in the opinion of some of us, this thing is not as it should be—the matter of the RFC and B. & O. loans. The only way to prove that thing is to build up a record of facts and happenings and occurrences taking place in the last 4 or 5 years in which the RFC has been the major party involved" (S 99).

2. "Senator ROBERTSON of Virginia. It is not yet perfectly clear to me what the full scope of this investigation is. Our general counsel on yesterday outlined what he termed a prima facie case, in which he made charges against officials of the RFC, charges against the officials and the B. & O., and challenged, I believe, the correctness of the decision of the special court that approved the bankruptcy proceedings in 1944.

"Clearly we have the right to put on trial, so to speak, Government officials who are impressed with a trust in handling Government funds. We may have the right to try the B. & O. Just what right we have to reverse the court, I do not know. But what I want to know now is, that is the major concern to this committee, is the part played by a Government agency.

"One charge was that you agreed to postpone-ment of the maturity date of your loan, and that in

doing so you placed the government at a disadvantage.

"Is that true or not?

"Mr. SULLIVAN. It is not true.

"Senator ROBERTSON of Virginia. You are charged in the prima facie case with some type of acquiescence in, or collusion with a fraudulent bankruptcy proceeding. Is that true or not?

"Mr. SULLIVAN. It is not true. Probably the Senator [Mr. Henderson] would prefer to answer that. But I will say that it is not true.

"Mr. HENDERSON. It is not true.

"Senator ROBERTSON of Virginia. You have read the prima facie case with respect to everything said about the RFC, have you?

"Mr. HENDERSON. I did not get that question.

"(The question was read.)

"Mr. SULLIVAN. Yes.

"Mr. HENDERSON. Yes.

"Senator ROBERTSON of Virginia. Is there any charge of misconduct in that prima facie case which was presented to us on yesterday which, in your opinion, is justified against RFC?

"Mr. SULLIVAN. There is not.

"Senator ROBERTSON of Virginia. That is all.

"The CHAIRMAN. Before we get through, I think that we will produce evidence that, in my judgment, will prove there was, and as to Mr. Sullivan, he is entitled to just as much consideration as I am or Mr. Clay or Mr. L'Heureux is.

"We will cite this on the evidence, and we will

prove, I think, before we get through, that the court, when they made the decision, did not have access to all of the facts in the case. And so we go along in the merry chase" (S 52).

-
3. "The CHAIRMAN. * * * When did you first consider the possibility of a McLaughlin Act proceeding?

"Mr. WHITE. Well I would have to refer to my notes to give you the exact date. I have that.

"The CHAIRMAN. Make it as near as you can.

"Mr. WHITE. I have that covered in the statement that I would like to present to this committee while I am here.

"The CHAIRMAN. Yes.

"Mr. WHITE. And I shall answer that question, and I think probably a great many others that you might have in mind.

"The CHAIRMAN. If you do not mind, I will finish these questions, and then you may make the statement" (S 131).

* * * *

"Mr. WHITE. I think I have those matters pretty well covered in the statement.

"The CHAIRMAN. In fact, if you had told me at the beginning that you had a statement, I would have been glad to hear you first, but I did not realize that.

"Mr. WHITE. I said it as quickly as I had a chance" (S 139).

* * * *

"Senator CAPEHART. [to the Chairman] May I ask a question?

"The CHAIRMAN. [to the witness] Do you wish to finish, or be interrupted.

"Mr. CLAY. [the witness] I have some more.

"The CHAIRMAN. [to Senator Capehart] Just wait, then, please" (S 495).

4. "The CHAIRMAN. You appreciate, Mr. White, I assume the question, that this committee's function and interest is not primarily the B. & O. Railroad. It is concerned with the RFC and its operations, and this is connected in the B. & O. matter. Therefore, these things come out. We are not primarily interested in the B. & O. affairs. We are charged with the duty of whether the RFC should be continued and as a condition precedent to that, we are looking into the RFC to see how they have been conducting their affairs. You understand that.

"Mr. WHITE. I understand more than that. I think I understand in a general way the purpose of your investigation, and what you are seeking to determine, so far as the RFC is concerned, but I also understand that you made some rather broad and definite charges that definitely concerned the B. & O. Railroad management.

"The CHAIRMAN. I certainly have, but that is not the prime purpose of the hearing. I charge that there has been chicanery and collusion in connection with the negotiation of this \$80,000,000 loan, and I still think so. That is a matter of opinion" (S 147).

5. "Mr. CLAY. * * * It is a stockholders' plan, of course.

"Senator CAPEHART. It is a stockholders' plan?

"Mr. CLAY. Yes.

"Senator CAPEHART. And the stockholders own the railroad, so it was a good thing for the B. & O.

"Mr. CLAY. Yes" (S 501-502).

* * * *

"The CHAIRMAN. You said that the B&O plan was a stockholders' plan. Do you think it was a good thing for the Baltimore & Ohio Railroad Co.?

"Mr. CLAY. I certainly do not. * * *

"Senator CAPEHART. You testified this morning on a direct question from me that it was a good thing for the B&O Railroad and the stockholders.

"Mr. CLAY. I would like to explain it" (S 520).

* * * *

"Senator CAPEHART. Did you not on a direct question from me say that it was a good thing for the Baltimore & Ohio Railroad and the stockholders?

"Mr. CLAY. I did, but I wanted to add this, a good thing over the short run but not over the long run, Senator.

"Senator CAPEHART. Why did you not say that this morning? Is your memory bad?

"Mr. CLAY. My memory is not bad, but I want to amplify what I said this morning.

"Senator CAPEHART. Why did you not amplify that this morning?

"Mr. CLAY. It did not occur to me * * *" (S 520).

-
6. "Senator CAPEHART. * * * This whole matter has been primarily tried in the newspapers * * *" (S 604).